Perunding Hashim & Neh Sdn Bhd v AXA Management Services Bhd (previously known as BH Insurance (M) Bhd)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22-NCC-633 OF 2011
NALLINI PATHMANATHAN J
18 JUNE 2012

Evidence — Expert evidence — Consideration of experts' reports and testimonies — Whether evidence was of assistance to court

Evidence — Witness — Failure to call witness — Available witnesses — Whether adverse inference should be drawn against plaintiff — Evidence Act 1950 s 114(g)

Insurance — Professional indemnity policy — Plaintiff covered against all acts and omissions amounting to negligent acts from retroactive date — Claim on policy — Whether plaintiff's claim fell within ambit of policy — Whether claim outside retroactive date — Limiting terms in policy — Whether plaintiff entitled to claim under policy

The plaintiff, a firm of civil and structural engineers, had tendered for a project, which involved the building of medium cost apartments in Shah Alam ('the project'). In July 2005, the developer of the project had appointed the plaintiff to provide consultancy services for the project. The plaintiff's design drawings of the shear walls and transfer beams, which were critical elements to provide structural support in the two apartment blocks comprising the project, were created in 2006. In 2007, construction drawings were issued and construction works on the project started. However, in 2009 it was discovered that the shear walls and the transfer beams as designed and constructed were not able to carry the intended load. The specific deficiencies in the plaintiff's designs ('the design deficiencies') had allegedly led to the transfer beams being unable to carry water tank loadings, accommodate openings in shear walls and properly transfer the loads from shear walls to the transfer beams. Under a professional indemnity policy ('the policy') the plaintiff was covered against all acts and omissions amounting to negligent acts. The policy issued by the defendant, insurer, in favour of the plaintiff, came into force as of 2 April 2007 ('the retroactive date'). The plaintiff sought to make a claim under the policy for the negligent acts it had committed, which had resulted in the construction of a defective building. The act of negligence in respect of which the plaintiff sought cover under the policy was the failure on its part to carry out a review of the design drawings prior to issuance of the construction drawings in 2007 onwards. The plaintiff

did not deny that there were inherent design deficiencies in the 2006 drawings but submitted that as a consequence of its failure or neglect to undertake a specific comprehensive review of the 2006 drawings, the defects remained in all subsequent construction drawings produced. The failure to review the 2006 drawings in the plaintiff's opinion was within the ambit of cl 1 of the policy. The defendant denied liability on the grounds that the negligent act of deficient design drawings occurred in 2006 and was thus outside the retroactive date. Further the defendant contended that even if it was found that there had been a failure to review as contended by the plaintiff, the dominant or proximate cause of the defective building was the inherent design deficiencies created in 2006 and not the failure to review prior to issuance of the construction drawings in 2007. The sole issue for determination in this case was whether the plaintiff's claim fell within the ambit of the policy. If the dominant or proximate cause of the design deficiencies were the 2006 design drawings, the claim would fall outside the ambit of the policy but if the dominant or proximate cause of the design deficiencies was the failure to review the design drawings before issuance of the construction drawings in 2007, the claim fell within the ambit of the policy.

Held, dismissing the plaintiff's claim with costs:

(1) There was a material lacuna in the factual matrix of the plaintiff's case particularly in relation to the point of time and chronology of events between the production and creation of the 2006 drawings and the later construction drawings. This was particularly significant in relation to the plaintiff's contention that there was a failure to review the original design in 2007 prior to the construction drawings that resulted in a defective building. Based on the lack of primary evidence of the negligent act or omission, this court found that there was a clear defect or negligence of the designs created in 2006 and the dominant or proximate cause of the defective building was the defective design of 2006, which was outside the retroactive period (see paras 59(a)–(d)).

(2) The evidence of the plaintiff's witness setting out the chronology of events leading up to the defective building amounted to hearsay and speculation. This witness was not involved in the 2006 or 2007 stage of the design and had no direct knowledge of precisely what had been done in relation to the 2006 drawings and the construction drawings. In the circumstances there was no evidence before the court of the precise act or omission in 2007 that the plaintiff maintained existed and which warranted a claim under the policy (see para 47).

(3) Although the plaintiff had available witnesses, namely the engineers involved in the project, who could have confirmed whether the checking and verification process had been undertaken, the plaintiff chose not to call any of these witnesses to establish the alleged negligent act or

omission that it had relied upon to make a claim under the policy. Further the plaintiff's failure to call the available witnesses warranted the drawing of an inference under s 114(g) of the Evidence Act 1950, namely that if they had attended and testified, their evidence would have adversely affected the plaintiff's case (see paras 43 & 49).

(4) The plaintiff's expert report did not assist in establishing the precise cause of the damage to the building. Having undertaken a consideration of the respective experts' reports, as well as their testimonies it appeared to this court that the defendant's expert evidence was to be preferred over the plaintiff's expert evidence. The defendant's expert's testimony was comprehensible and his theories were more credible as well as supported by available documentary evidence (see paras 53(a) & 56).

(5) Clause 2.4 of the policy envisaged that there should be legal proceedings commenced against the plaintiff by a third party, namely the developer of the project, within two years of the date of the written notice before the defendant insurer was liable under the policy. However, no legal proceedings had been so commenced. Further under cl 2.12 of the policy the plaintiff could not maintain an action against the defendant until the amount of loss had been fixed or rendered certain. As these requirements had not been met it would appear that the plaintiff was not entitled to claim under the policy (see paras 68–69).

[Bahasa Malaysia summary

Plaintif, sebuah firma jurutera sivil dan struktur, telah mendapat tender projek, yang melibatkan pembinaan pangsapurikos sederhana di Shah Alam ('projek tersebut'). Dalam bulan Julai 2005, pemaju projek tersebut telah melantik plaintif untuk memberikan khidmat pakar runding untuk projek tersebut. Lukisan reka bentuk dinding penampung dan cerucuk pindahan plaintif, yang merupakan elemen penting untuk memberi sokongan struktur kepada dua blok apartmen yang merupakan sebahagian projek tersebut, telah dibina pada tahun 2006. Pada tahun 2007, lukisaan pembinaan itu telah dikeluarkan dan kerja pembinaan ke atas projek tersebut bermula. Walau bagaimanapun, pada tahun 2009 ia mendapati bahawa dinding penampung dan cerucuk pindahan sebagaimana yang direka bentuk dan dibina tidak mampu menampung beban yang dibina. Terdapat kesilapan spesifik dalam reka bentuk plaintif ('kesilapan reka bentuk') yang telah membawa kepada cerucuk pindahan yang tidak mampu menampung beban tangki air, menyesuaikan bukaan dinding penampung dan dengan lancar memindahkan beban daripada dinding penampung kepada cerucuk pindahan itu. Di bawah polisi perlindungan profesional, ('polisi tersebut') plaintif telah dilindungi daripada semua perbuatan dan peninggalan yang membentuk perbuatan yang cuai. Polisi tersebut telah dikeluarkan oleh defendan, pemberi insurans, yang menyebelahi plaintif, dan telah mula berkuat kuasa pada 2 April 2007 ('tarikh ke belakang'). Plaintif memohon untuk membuat tuntutan di bawah polisi tersebut kerana

perbuatan cuai yang telah dilakukannya, yang mengakibatkan pembinaan bangunan yang tidak sempurna. Perbuatan cuai yang ingin dipohon oleh plaintif di bawah polisi tersebut adalah kegagalan di pihaknya untuk melaksanakan kajian semula lukisan reka bentuk tersebut sebelum mengeluarkan lukisan pembinaan tersebut bermula dari tahun 2007. Plaintif tidak menafikan bahawa terdapat kesilapan reka bentuk yang sedia ada pada lukisan 2006 itu tetapi berhujah bahawa akibat daripada kegagalan atau kecuaiannya untuk melakukan kajian semula komprehensif yang spesifik ke atas lukisan 2006 itu, maka kesilapan tersebut kekal di dalam semua lukisan pembinaan yang dikeluarkan berikutnya. Kegagalan untuk mengkaji semula lukisan 2006 itu pada pendapat plaintif adalah dalam skop fasal 1 polisi tersebut. Defendan menafikan liabiliti atas alasan bahawa perbuatan cuai pada lukisan reka bentuk yang salah itu berlaku pada tahun 2006 dan oleh itu adalah di luar tarikh ke belakang tersebut. Selanjutnya defendan berhujah bahawa meskipun adalah didapati bahawa terdapat kegagalan untuk mengkaji semula seperti yang ditegaskan oleh plaintif, sebab utama atau ketara pembinaan yang defektif itu adalah kerana kesilapan reka bentuk sedia ada yang dilukis pada tahun 2006 dan bukan kegagalan mengkaji semula sebelum lukisan pembinaan itu dikeluarkan pada tahun 2007. Isu utama untuk ditentukan dalam kes ini adalah sama ada tuntutan plaintif terangkum dalam skop polisi tersebut. Jika sebab utama atau sebab langsung kesilapan reka bentuk adalah pada lukisa reka bentuk 2006 tersebut, maka tuntutan tersebut adalah di luar skop polisi tersebut tetapi jika sebab utama atau sebab langsung kesilapan reka bentuk tersebut adalah kegagalan untuk mengkaji semula lukisan reka bentuk tersebut sebelum lukisan pembinaan dikeluarkan pada tahunan 2007, tuntutan adalah dalam skop polisi tersebut.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Wujud lacuna yang material dalam matriks faktual kes plaintif khususnya berkaitan masa dan kronologi kejadian antara penghasilan dan rekaan lukisan 2006 dan lukisan pembinaan yang seterusnya. Ini penting berkaitan dengan hujah plaintif bahawa terdapat kegagalan untuk mengkaji semula reka bentuk asal pada tahun 2007 sebelum lukisan pembinaan tersebut yang mengakibatkan pembinaan bangunan yang defektif. Berdasarkan keterangan primer berhubung perbuatan atau peninggalan yang cuai, mahkamah ini mendapati bahawa terdapat kesilapan atau kecuaian yang jelas pada reka bentuk yang dibuat pada tahun 2006 dan sebab utama atau ketara pembinaan defektif itu adalah kesilapan reka bentuk 2006 itu, yang di luar tempoh ke belakang tersebut (lihat perenggan 59(a)–(d)).

(2) Keterangan saksi plaintif menyatakan kronologi kejadian tersebut yang membawa kepada bangunan defektif tersebut adalah hanya dengar cakap dan spekulasi. Saksi ini tidak terlibat dalam peringkat reka bentuk 2006 atau 2007 dan tiada pengetahuan secara langsung berhubung apa sebenar

yang telah dilakukan berkaitan lukisan 2006 tersebut dan lukisan pembinaan tersebut. Dalam keadaan itu tiada keterangan di hadapan mahkamah berhubung perbuatan atau peninggalan yang khusus pada tahun 2007 yang plaintif menyatakan wujud dan yang mewajarkan tuntutan di bawah polisi tersebut (lihat perenggan 47).

(3) Walaupun plaintif mempunyai saksi-saksi sedia ada, iaitu para jurutera yang terlibat dalam projek tersebut, yang boleh mengesahkan sama ada proses pemeriksaan dan pengesahan telah dilaksanakan, plaintif memilih untuk tidak memanggil semua saksi tersebut bagi membuktikan perbuatan atau peninggalan cuai yang dikatakan itu yang mana ia bergantung kepadanya untuk membuat tuntutan di bawah polisi tersebut. Selanjutnya kegagalan plaintif untuk memanggil saksi mewajarkan pembentukan inferens di bawah s 114(g) Akta Keterangan 1950, iaitu di mana jika mereka hadir dan memberi keterangan, keterangan mereka sebaliknya akan menjejaskan kes plaintif (lihat perenggan 43 & 49).

(4) Laporan pakar plaintif tidak membantu dalam membuktikan sebab sebenar kerosakan bangunan tersebut. Setelah mempertimbangkan laporan pakar tersebut dan juga testimoni mereka mahkamah ini mendapati bahawa keterangan pakar defendan lebih diyakini daripada keterangan pakar plaintif. Testimoni pakar defendan boleh difahami dan teorinya lebih boleh dipercayai dan juga disokong oleh keterangan dokumentar sedia ada (lihat perenggan 53(a) & 56).

(5) Fasal 2.4 polisis tersebut termaktub bahawa patut terdapat prosiding perundangan yang dimulakan terhadap plaintif oleh pihak ketiga, iaitu pemaju projek tersebut, dalam tempoh dua tahun dari tarikh notis bertulis sebelum pemberi insurans defendan adalah bertanggungjawab di bawah polisi tersebut. Walau bagaimanapun, tiada prosiding undang-undang telah dimulakan. Bahkan di bawah fasal 2.12 polisi tersebut plaintif tidka boleh mengekalkan tindakan terhadap defendan sehingga jumlah kerugian telah ditetapkan atau dianggap pasti. Oleh kerana keperluan tersebut tidak dipenuhi ia kelihatan bahawa plaintif tidak berhak menuntut di bawah polisi tersebut (lihat prenggan 68–69).]

Notes

For cases on failure to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 3135–3145.

Cases referred to

American Home Assurance Co v Nalin Industries Sdn Bhd [1993] 2 MLJ 409, SC (refd)

JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay') [1987] 1 Lloyd's Rep 32, CA (refd)

Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society, Ltd [1918] AC 350, HL (refd)

Yorkshire Dale Steamship Co Ltd v Minister of War Transport (The Coxwold) [1942] AC 691, HL (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

HL Choon (Melody Leong with him) (Raja Danyl & Loh) for the plaintiff.

Law Chi Cheng (Sharifah Nadia Al-Jafh with her) (Lim Kian Leong & Co) for the defendant.

Nallini Pathmanathan J:

[1] The plaintiff is a firm of civil and structural consulting engineers. The plaintiff was appointed sometime in July 2005 to provide civil and structural engineering consultancy services for a project described as 'Cadangan Pembangunan (Fasa 1), 2 Blok Pangsapuri Kos Sederhana Tinggi 15 Tingkat Dengan 2 1/2 Tingkat Ruang Tempat Letak Kereta Yang Mengandungi 435 Unit Kediaman …(Dan Lain-Lain)'. The project involved the building of medium cost apartments in Shah Alam. The plaintiff was appointed by the developer, one CB Land Sdn Bhd ('CB land').

[2] The issue that arises for adjudication in this case is the plaintiff's entitlement to make claim for negligence under an insurance policy issued by the defendant, dated 2 April 2007, which was renewable yearly. The plaintiff's claim is pursuant to Professional Indemnity Policy No S2DLCP0807850900 ('the policy').

[3] The plaintiff contends that acts or omissions amounting to negligent acts were committed after the policy came into force as of 2 April 2007 ('the retroactive date'). The plaintiff seeks the sum of RM1.4m for strengthening works and RM1.9m for collateral works. In essence the plaintiff's contention is that due to the defective design of shear walls and transfer beams in the two apartment blocks comprising the project, which were discovered subsequently in 2009, they were constrained to carry out strengthening works to strengthen the shear walls and transfer beams. The specific deficiencies in the design led to transfer beams' being unable to carry water tank loadings, accommodate openings in shear walls and properly transfer the loads from shear walls to the transfer beams. Based on these acts of negligence, the plaintiff maintains that it is entitled to recover under the insurers' policy of insurance which was taken out specifically for negligence.

[4] The act of negligence in respect of which the plaintiff seeks cover under

the policy of insurance, is the failure on its part, to carry out a review of the design drawings prior to issuance of the construction drawings in 2007 onwards. In other words, notwithstanding inherent design defects in the 2006 drawings, the plaintiff failed or neglected, it is contended, to undertake a specific comprehensive review of the design drawings of 2006, as a consequence of which the defects remained in all subsequent construction drawings produced. This in turn resulted in the construction of a defective building. Such an act of negligence, in failing to review the design drawings so as to detect the inherent defect, they maintain, falls within the ambit of cl 1 of the policy of insurance.

[5] The defendant insurance company ('insurers') contends otherwise. By way of defence the insurers state that the negligent act and the only negligent act is that of deficient design in June 2006. This inherent defect, they contend, is outside of the retroactive date, as a consequence of which liability is denied. Additionally the insurers contend, vis a vis the plaintiff's allegation of a failure to review, that the same has not been proved at trial, which is a second reason why liability is denied. Finally the insurers contend that even if it is found that such a review had not been undertaken as contended by the plaintiff, the dominant or proximate cause of the defective building was the inherent deficient design created in 2006 and not the failure or omission to review the design drawings prior to issuance of the construction drawings in 2007.

[6] The central dispute between the parties therefore is whether the, dominant or proximate cause of the deficiencies in the shear wall and transfer beam design was:

(a) the design drawings created in 2006; or

(b) the failure to review the design drawings before issuance of the construction drawings in 2007.

[7] If the former is the proximate cause, ie (a), then the claim falls outside the ambit of the policy of insurance. If the latter is the proximate cause however, the claim falls within the ambit of the policy of insurance. It therefore follows that the date of design or creation of the design drawings is significant as is the identification of the drawings which formed the basis of the defective construction drawings.

THE TRIAL

[8] The trial of this matter took place over a period of four days. Three witnesses testified, two for the plaintiff and one for the defendant:

(a) Ir Ng Tuan Hong, PW1 ('PW1') who testified on behalf of the plaintiff in relation to the factual matrix of the case;

(b) Ir Leong Saik Onn, PW2 ('PW2') who testified as an expert on behalf of the plaintiff; and

(c) Ir Tan See Teik, DW1 ('DW1') who testified as an expert on behalf of the defendant.

BACKGROUND FACTS

[9] A tender exercise for this project was carried out sometime in 2006. Prior to that the plaintiff carried out design work for the project and produced tender drawings which were issued in June 2006 for the purposes of the tender exercise. The two structural elements that are significant for the purposes of this claim are the shear walls and the transfer beams of the two apartment blocks. The shear walls and the transfer beams are critical elements to provide structural support for the building ie for the building to stand. Simply put, the nature of the deficiencies with respect to these two elements is that the shear walls and transfer beams as designed and constructed were not able to carry the intended load.

DOCUMENTS FOR SHEAR WALL DESIGN

[10] The shear wall design is reflected in the shear wall calculations produced in the course of evidence. The plaintiff also produced at trial a set of tender drawings for the shear walls as well as the transfer beams. Vide letter dated 16 December 2009 the insurer's adjusters sought and procured confirmation from the plaintiff that the detailed design calculations of the shear walls were undertaken in 2006. The following year, in 2007, the thickness of the shear wall was reduced from 130mm–125mm. To understand and ascertain the reason for such a reduction in thickness of the shear wall design, the plaintiff sought clarification from the consultant engineer and project director who had charge of this project, Ir Toh Hock Choon, but could obtain no reason for the reduction effected. Neither could the plaintiff explain the reasoning behind, the reduction in thickness after review and checking of the structural design and details. However the plaintiff, significantly, confirmed that this reduction in thickness did not materially affect the design that was carried out in 2006. In other words the design drawings for the shear walls which were ineffective to carry their intended loading and to that extent contained negligent errors, were created in 2006.

[11] The plaintiff confirmed to the adjusters also that the footprint for the building design remained essentially the same. The building remained at sixteen storeys such that the shear wall structural design did not change in any way. Other changes effected were architechtural changes. In summary

therefore it is not in dispute that there was only one structural design for the shear walls and that was created in 2006. The 2007 design whereby the shear wall thickness was reduced did not effect any material change to the structural design.

[12] With respect to the 2006 shear wall design it is relevant that the thickness specified was 125 millimetres. With weld mesh reinforcement being the specified reinforcement strength. This design did not take into account roof top water tank loadings or openings in the shear walls.

TRANSFER BEAM DESIGN

[13] The following may be gleaned from the correspondence between the defendant's adjuster and the plaintiff whereby the plaintiff essentially confirmed the following matters. The plaintiff was not able to produce the 2006 design for the transfer beams contending that it could not be found. The plaintiff could only produce the 2007 transfer beam design calculations. The plaintiff explained the design process in some detail. At the tender stage due to time constraints it was not necessary for the plaintiff to design each and every transfer beam. However the design concept had to be formulated. For this purpose the load transfer mechanism to be used in the design had to be selected. The loadings had to be calculated based on the design foot print and these included the loadings to be carried based on the heights of the shear walls and the openings therein. Representative transfer beams had to be selected and designed so that the quantities of reinforcement bars, formwork and concrete, amongst others, could be calculated to facilitate the formulation of the provisional bills of quantities.

[14] The plaintiff described the design process as follows:

(a) typical transfer beams for the design process are selected;

(b) design loadings on transfer beams are entered into the computer software;

(c) a design method such as load transfer mechanism between shear wall and transfer beam is then selected;

(d) openings in the shear walls are then ascertained;

(e) the transfer beams are then designed;

(f) the drawings for the tender exercise are produced. In the instant case there were only five drawings for the details of typical transfer beams; and

(g) as the exercise was undertaken based on representative transfer beams the quantities of other materials required were merely provisional in nature.

[15] PW1, Ir Ng Tuan Hong, confirmed in the course of cross-examination that the 2006 transfer beam designs would have been done at the same time as the 2006 shear wall designs in the ordinary course of events. He also confirmed that they would have been designed hand in hand with the 2006 shear wall designs, with the 2006 transfer beam designs being done after the 2006 shear wall designs. In fact the transfer beam designs were sequential to the shear wall designs.

[16] The plaintiff contends that at this the tender stage and prior to the issuance of the construction drawings the design for the shear walls and transfer beams was rough and preliminary in nature and was merely intended for preliminary project costing for purposes of the tender. In short it was of an impermanent nature, it was contended at trial. The insurers on the other hand maintained that it is of no consequence whether these designs are labelled 'rough' or 'preliminary' because it has been accepted that these designs were the platform on which the shear walls and transfer beams were built. The plaintiff in response maintains that the fact that they were 'rough' is nonetheless relevant as it highlights the need to review the drawing prior to the construction drawings, a step that was never undertaken, and which the plaintiff maintains is the negligent act or omission which enables them to make claim under this policy of insurance.

CONSTRUCTION DRAWINGS — 2007

[17] In 2007, construction drawings were issued periodically and construction works started. At this stage the design engineer had to design each and every transfer beam. The plaintiff confirmed that the engineer retained the overall design concept including the load transfer mechanism between the shear wall and transfer beam. The design process at this stage was to:

(a) check the actual length of each beam and enter the information into the computer software system;

(b) optimise the dimensions of the beam and refine the reinforcement bar details;

(c) provide structural drawings for each transfer beam; and

(d) the design of each transfer beam was saved as a single file in the computer software and the latest file would supercede the previous one.

[18] In effect it was conceded that the 2006 transfer beam structural design had not been changed in any way. The changes were limited to architectural ones. The plaintiff advised that the computer input and design calculations undertaken in 2006 for transfer beams could not be made available as these had

been overwritten by the subsequent computer input adjustment and computer design calculations. They could not be retrieved.

[19] The plaintiff also confirmed to the insurer's adjusters that the refinements and optimisations undertaken on the transfer beams in 2007 did not materially affect the transfer beam design that was carried out in 2006. In other words, the deficiencies in the design which led to the transfer beams' inability to carry the water tank loadings, accommodate openings in the shear walls and properly transfer the loads from shear walls to the transfer beams had been inherent in the 2006 design. Such deficiencies did not appear to have been realised or intended to have been realised or made good in the 2007 design. Accordingly these deficiencies were not addressed in the 2007 design.

[20] On the issue of the design calculations for the transfer beams both parties witnesses gave differing testimony. The plaintiff contended that in June 2007 a set of design calculations for the transfer beams were produced. The actual calculations were not produced as they were irretrievable as explained earlier. Part of the design is shown by way of an ETABS modelling produced in evidence. PW1, a witness of fact, stated that 'these are the records of design calculations and verifications for the transfer beam carried out by the plaintiff prior to issuing the construction drawings. This was the basis for the construction drawings'. However the defendant points out that PW1 was not the negligent engineer and therefore has no personal knowledge of this fact. This evidence it is contended should therefore be ignored.

[21] The defendant's expert witness, DW1, Ir Tan See Teik however testified that having reviewed the same, he concluded that the design calculations referred to in evidence were computer print outs and summary sheets of computer print outs and accordingly are not calculations but were only output files and summary sheets respectively. The plaintiff contends that these design calculations are relevant because they were produced immediately prior to the construction drawings. The failure to review these design calculations it is contended amounts to a negligent act.

[22] Having considered the evidence it appears to this court that PW1 is not in a position to testify that the calculations referred to in fact comprised the records of design calculations and verifications because as pointed out by the insurers, he has no personal knowledge of the same. The negligent engineer who the plaintiff has access to, would have been the right witness to testify that this comprised the design calculations. He was however absent. To that extent, PW1's evidence being hearsay is not relevant. With respect to the defendant's expert witness, while not a witness of fact, preferred his opinion to the effect that these calculations were insufficient to amount to design calculations. The evidence of the two experts was therefore contradictory.

[23] It appeared to this court however, that the onus lies on the plaintiff to establish that the calculations referred to were in fact the records of design calculations. That has not been so established in the light of the evidence produced.

TYPES OF ERRORS AND OMISSIONS

[24] The plaintiff confirmed to the insurer's adjusters that the types of design errors and omissions committed by the design engineer fell into three categories namely an inability to:

(a) carry the water tank loadings;

(b) accommodate openings in the shear walls; and

(c) properly transfer the loads from shear walls to the transfer beams.

[25] The construction of the apartment block then commenced after the progressive issuance of the construction drawings. In 2009, the plaintiff's project director, Toh Hock Choon and project design engineer for this project, one Chuah Lay Yee resigned. They were the persons having direct knowledge of the origin of the designs for the shear walls; and the transfer beams. Other engineers, when taking over the works, discovered design deficiencies. By this time however construction of the two apartment blocks had been completed with all finishes and fixtures.

[26] On 20 July 2009 the first notification was issued by the plaintiff to the insurers. They gave notice that they had become aware of a circumstance or event which could reasonably be anticipated to give rise to a demand in the future. The notification related solely to deficient designs in respect of the shear walls only at this stage. With regard to the transfer beam, the plaintiff notified the defendant of the defects vide a joint site visit.

[27] Then followed a series of correspondence between the parties whereby the insurer and its agents, namely its adjuster assessed and undertook an investigation prior to deciding whether or not the incident warranted cover under the policy of insurance taken out by the plaintiff. The Insurer contends that of particular importance are letters from the plaintiff to the Insurer dated 20 July 2009 and 28 July 2009. In the first letter the plaintiff advised the defendant that the 'shear walls of the apartment block are now found to be structurally under designed and will have to be strengthened'. This, the defendant submits, indicates that the plaintiff accepted that the shear walls were in fact deficiently designed. The design deficiency they maintain goes back to 2006.

[28] The plaintiff advised the insurer vide letter dated 28 July 2009 that 'The structural design and typical details were carried out in 2006 for the tender preparation'. The defendant maintains that there was only one set of designs for the building and this set was dated 2006. No other designs were produced for 2007. There is reference to strengthening work to be undertaken which again suggests that the 2006 design was defective. The plaintiff does not dispute this.

[29] The correspondence culminated in a final letter from the insurer's adjuster dated 16 December 2009 requesting the plaintiff to confirm the factual matrix. I have referred to the letter and its contents comprehensively above. The plaintiff gave the adjusters written confirmation of the factual matrix which means in effect that the facts and evidence set out there are not in dispute.

[30] The insurer vide its letter of 9 December 2010 confirmed its rejection of the plaintiff's claim. The insurer highlighted the following salient matters:

(a) there was only one structural design for the shear walls and that was carried out in 2006. The 2007 design merely involved architectural changes;

(b) the 2006 transfer beam structural design had not been changed in, any way in 2007. The changes to the beam designs were limited to architectural ones. For example the length of the transfer beam had to be amended to suit the changes in the architectural layout play;

(c) the refinements and optimisations undertaken on the transfer beams in 2007 did not materially affect the transfer beam design that was carried out in 2006. In other words, the deficiencies in the design which led to the transfer beams' inability to carry the water tank loadings, accommodate openings in the shear walls and properly transfer the loads from shear walls to the transfer beams had been inherent in the 2006 design; and

(d) the types of design errors and omissions committed by the design engineer fell into three categories as outlined earlier.

[31] In other words, the construction drawings issued in 2007 followed the 2006 shear wall designs and 2006 transfer beam designs and hence failed to take into account rooftop water tank loadings and openings in shear walls, resulting in the structures being unable to take the load or support the two

apartment blocks. Hence the structures were structurally under designed.

ISSUES

[32]

(a) Is the dominant or proximate cause of the loss arising from the defective building:

(i) the 2006 negligent act namely the deficient design; or

(ii) the 2007 negligent act, if any, in relation to the failure to review the design; and

(b) In the event that this court finds that there are two equally dominant causes, whether the plaintiff has succeeded or is entitled to claim under the policy.

[33] The defendant however maintains that this latter issue (b) has not specifically been pleaded while the plaintiff maintains that as it has pleaded the 2007 failure to review as a cause this is sufficient to enable the court to consider the same. Having considered the issue I determined that as the 2007 negligent failure to review has in fact been pleaded as a cause it is open to this court to consider both issues (a) and (b). However, if (a) is determined in favour of the insurers, then (b) may well not arise. It is only in the event that the court finds that both acts or omissions, namely the deficient design in 2006, as well as the negligent failure to review comprise equally dominant causes, that issue (b) arises.

ISSUE (A): IS THE DOMINANT OR PROXIMATE CAUSE OF THE LOSS ARISING FROM THE DEFECTIVE BUILDING

(iii) the 2006 negligent act namely the deficient design; or

(iv) the 2007 negligent act, if any, in relation to the failure to review the design

[34] The plaintiff submits that the loss it suffers and in respect of which it seeks an indemnity from the insurer is the costs of rectifying the defective building arising from the defective design. It is pointed out that it cannot be disputed that the contractor constructed the structure in accordance with the construction drawings and naturally, if the design in the construction drawings is deficient, the structure would necessarily also be deficient. As such the plaintiff points to the act of negligence of the preparation of the construction drawings in 2007, without review of the original design, as being at least 'a' cause of the loss suffered.

[35] The plaintiff supports this contention by application of the simple 'but-for-test — But for such negligence, the design deficiencies would have been avoided or detected, and rectified before the construction drawings were issued for construction and the loss would not have occurred. The plaintiff relies on the evidence of both experts for the plaintiff and the insurer who agreed that if a proper review had been carried out, the deficiencies would have been picked up. The plaintiff relies on the evidence of the insurer's expert, DW1, who highlighted the link between the adoption of the 2006 initial design without review in 2007, and the consequences that followed:

> … So for convenience sake and oversight, simplistic thinking, the plaintiff had then used the 2006 simplistic design and put in the construction drawing. And that is where the problem arise is [sic] arise first on the shear wall then it cause problem to the transfer beams.

[36] The plaintiff then argues that if it is accepted that the negligence in 2007 is at least 'a' cause of the loss, then the plaintiff is entitled to recovery under the policy. In support of this proposition learned counsel cites *Halsbury's Laws of England* (5th Ed), Vol 60, para 348 where it states:

> If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy the assured will be entitled to recover.

[37] As there is no excepted cause or exclusion here the plaintiff maintains that it is entitled to recover.

[38] The plaintiff further submits that the only other 'cause' identified by the insurer was the deficient initial design in 2006. Referring to the insurer's contention that the negligent design of 2006 comprises the dominant cause of the loss and that the failure to review, if at all, in 2007 was merely consequential upon the primary cause of negligent design, the plaintiff dismisses these contentions, arguing that:

(a) although the initial design process and review process are part of the overall design process sequence the latter failure to review is not sequential to and does not flow from the earlier negligent act of 2006;

(b) irrespective of whether or not the design was defective the plaintiff maintains that it was incumbent upon itself to carry out a review process in 2007 which it failed to do. This it is maintained amounts to an independent omission constituting negligence; and

(c) the two events are separate, ie the 2006 deficient design is separate from the 2007 failure to review and the latter is not consequential upon the former.

[39] In summary the plaintiff contends that:

(a) as long as it is shown that the negligence after the retroactive date, ie 2007, was at least 'a' cause of the loss, the insurer's liability under the policy is established;

(b) it cannot be denied that the negligence in 2007 was at least 'a' cause. But for such negligence the deficiencies would have been discovered and naturally rectified thereby averting the loss;

(c) under the law, as long as the peril insured against (ie negligence post retroactive date) is shown, then it does not matter what happened before that or whether there were any other causes. The only exception is that if the other cause is an excepted peril;

(d) in the present case, the only other cause of the loss put forward by the plaintiff is the negligence in 2006, which is clearly not an excepted peril;

(e) as such, it is not even necessary to determine which is more dominant or proximate between the negligence in 2006 and that in 2007;

(f) the case of *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay')* [1987] 1 Lloyd's Rep 32 establishes that there may be more than one proximate cause for a given loss, and as long as one of them is an insured peril, then liability is established. In the present case, negligence post-retroactive date is an insured peril. So even if it is found that both the deficient design in 2006 and the failure to review in 2007 are both 'proximate' causes of the defective building, then liability is established; and

(g) although the design deficiencies first occurred in 2006, such deficiencies would not have caused any loss but for the subsequent intervening event, ie the negligence in 2007.

[40] With regards to the initial design in 2006, the plaintiff maintains that these drawings were only for the preliminary and tender stages. The plaintiff points to the fact that both experts agreed that these drawings in themselves would not have been sufficient for construction purposes. It was therefore envisaged at all times that a new set of drawings, namely the construction drawings were to be produced. The plaintiff therefore maintains that as such, it was the act of utilising the initial 2006 drawings without reviewing the same prior to the preparation of the construction drawings in 2007 that is the proximate cause of the loss. But for such a negligent act in 2007 to use the initial 2006 design without checking and verification, the loss would not have arisen. As such the plaintiff submits that it was the negligence in 2007, after the retroactive date, that was the proximate cause of the loss. The elements of the insuring clause of the policy have therefore been satisfied.

[41] The insurer submits to the contrary. It is pointed out that the plaintiff does not dispute and in fact concedes that there were defects in the 2006 design of the shear walls and transfer beams. The insurer however questions whether there are any negligent acts in 2007 as pleaded or at all and if so, whether such an act of omission would comprise the dominant or proximate cause of the loss.

[42] In essence the defendant maintains that the plaintiff has failed to specifically plead any particular act of negligence with regards to the 2007 designs. Moreover the issue of whether such a negligent act in 2007 was actually proved evidentially is also in issue.

[43] The defendants charges that the plaintiff failed to particularise in its pleadings the specific error or omission. Likewise in evidence it did not give any factual basis to support its contention. In this context the plaintiff points to the fact that the plaintiff had available witnesses, namely the engineers involved in the project who could have confirmed for this court whether or not the checking and verification process was undertaken or not done. Although these engineers no longer work for the plaintiff they are contactable as is borne out by correspondence from the plaintiff to the insurer's adjusters. Notwithstanding this, the plaintiff chose not to call any one of these engineers to establish the alleged negligent act or omission they relied upon to make claim under the policy. In short there is no direct evidence of the allegedly negligent 'omission' to check. This is a material omission by the plaintiff. I therefore make this finding, namely that there is no primary evidence of the negligent act or omission before this court because there was no witness or document that could establish the same. The evidence from the plaintiff's witnesses, the first who sought to set out the factual matrix, amounted to hearsay and speculation as PW1 had no direct knowledge of precisely what had or had not been done in relation the tender drawing and construction drawings. He could only speculate from a perusal of available documents and drawings where the error lay. This it is clear is insufficient to form the evidential basis to establish factually, a negligent error or omission. As for PW2, the expert his opinion evidence is necessarily premised on a factual matrix which must first be established. Therefore his evidence is of limited value where the primary facts comprising the factual matrix cannot be established.

[44] There was no evidence to establish what happened after the initial designs and drawings for the tender stage were completed in 2006. No witness from the plaintiff was called to testify as to process, instructions, requirements and why revisions were made and the reasons for such revisions. Here again such evidence was available from the engineers who had prepared these drawings but these witnesses were not called.

[45] The issue for consideration is whether the plaintiff committed an act of

negligence in producing the construction drawings in 2007. Reference to 'design' reflects the 2006 shear wall calculations provided by the plaintiff, while the 2006 transfer beam designs are the calculations for the transfer beams which have been overwritten and therefore could not be produced as explained earlier. Notwithstanding this certain confirmations had been given by the plaintiff in respect of the same. These sets of designs therefore comprised the blue print for the construction of the shear walls and transfer beams. Two crucial elements in the design were also found to be replicated or reproduced in the construction drawings namely the thickness of the shear wall at 125mm and the reinforcement specified as 'A9').

[46] The insurer submits that the design is neither the tender drawings nor the construction drawings but the calculations referred to above and which comprised the blue print for the subsequent drawings. The insurer therefore submits that the plaintiff has failed to establish that there were in fact subsequent designs in 2007 which eclipsed the 2006 designs. I agree that the 'design' was reflected in the computations and calculations rather than the tender and construction drawings produced from such calculations/designs. The fact that the construction drawings were produced from the calculations and computations in 2006 is also not essentially in dispute. The crucial elements referred to above bear this out. As there was only one set of such calculations and computations produced, it would appear that no 'design' per se was produced separately in 2007.

[47] There was a lack of evidence in terms of precisely what transpired between the tender stage and the construction stage. Although in his witness statement PW1 sought to reconstruct a version of events setting out the chronology of events leading up to the defective construction, he conceded in cross-examination that he was not in a position to verify whether as a matter of fact, checks had or had not been undertaken. PW1 was not involved in the 2006 or 2007 stage of the design and was therefore not able to confirm why certain amendments had been made. He was also unaware of the number and capacity of water tanks over the roof. As PW1 confirmed that he was not involved until after the project director, one Tan and the project engineer, Chuah had both left, he was not in a position to explain where or how the negligent acts or omissions had occurred. Again the two key witnesses concerned namely the engineers were not present in court although they were available. In summary it appears to this court that PW1's evidence was largely hearsay. To that extent there was no evidence before the court of the precise act or omission in 2007 that the plaintiff maintained existed and which warranted a claim under the policy.

[48] The extent of his lack of knowledge in relation to salient matters is

evident from a perusal of his testimony in the course of cross-examination, the contents of which I do not reproduce here. Therefore PW1's evidence did not establish the plaintiff's claim.

[49] The fact that the plaintiff failed to call Tan and Chuah although they were available warrants the drawing of an inference under s 114(g) of the Evidence Act 1950 namely that if they had attended and testified their evidence would have adversely affected the plaintiff's case.

[50] The salient issue for consideration is whether there was in fact a further or other act of negligence after the negligent design in 2006, warranting a claim under the policy. From the evidence led by the plaintiff there appears to be no factual basis for asserting a failure to check or review. There was simply no primary or direct evidence to establish this.

[51] It is also evident from the contents of the adjuster's letter of 16 December 2009 that the construction drawings followed the original design for the shear walls and transfer beams of 2006 design. As such it would appear that the construction drawings were consequential upon or sequential to the original 2006 designs of 2006. The construction drawings emanated from the defective 2006 design.

EXPERT EVIDENCE

[52] The plaintiff's expert, PW2, Leong Saik Onn in his report and evidence confirmed that his report is in effect a visual comparison of the tender drawings and construction drawings. PW2 confirmed that he was given no factual basis and his comments to that extent are not premised on what actually happened during that period.

[53] Separately PW2 also admitted in the course of his evidence that he did not evaluate the 2006 designs and did not consider the failure to take into account water tank loading and openings in shear walls. Having considered his testimony in its entirety I agree with learned counsel for the defendant that:

(a) the plaintiff's expert report did not assist in establishing what precisely was the cause of the damage to the building;

(b) the report was essentially a comparison of the available tender and construction drawings in relation to shear walls and transfer beams;

(c) PW2's answers were convoluted and less than direct; and

(d) he was not familiar with the project and as such was unable to proffer an expert opinion on the cause of the damage.

[54] By comparison the defendant's sole witness, the expert, DW1, undertook a comprehensive evaluation of the plaintiff's documents from the 2006 designs, tender drawings, construction drawings and the ETABS model and analysis. He concluded from the foregoing that the construction drawings reflected an adoption of the 2006 design of 125mm thickness and A9 reinforcement with a continued neglect to address the water tank loading and openings in shear walls as was the case with the 2006 designs. He also highlighted the differences such as the use of grade 30 rather than grade 25 concrete but explained that this difference was not material. He pinned the real cause of the deficiency of design on the failure to take into account the water tank loadings and openings in the shear walls and the use of concrete pillars of 125mm thickness with A9 reinforcement which was insufficient to take the loading.

[55] DW1 was consistent in the course of cross-examination despite it being put to him that there were material differences and changes between the tender and construction drawings. He stated that these differences were, as a whole, not significant and the critical items namely the water tank loading and openings in shear walls remained deficient. He reiterated that the original design of 2006 as evident from the use of 125mm thickness and grade A9 concrete was adopted and continued in the 2007 design thus establishing that the defective or negligent design emanated from 2006 and continued into 2007.

[56] Having undertaken a consideration of the respective experts' reports as well as their testimonies particularly in the course of cross-examination it appears to this court that the expert evidence of DW1 is to be preferred over the evidence of PW2 because his testimony was comprehensible, the theory plausible and considerably more credible, as well as supported by available documentary evidence. What was particularly significant was DW1's explanation of why PW2's assertion that the construction drawings were defective was not a correct interpretation of matters in this case:

> Witness (DW1): … you can see that I say see reply comment 35 so inter-related to that Mr Leong is saying that the construction drawings were defective. I have explained in my report and now I will try to repeat what I said in my report. He said construction drawing. The construction drawing that follow the design detail indicated is not in error. My Lady, do you understand? It's a bit technical.
>
> If somebody designs something wrong no matter how wrong it is, the construction drawing depicts exactly the wrong errors inside. The construction drawings are correct. It is the design that is defective. A construction drawing will be defective if the engineer says it has to be this, this, this, and that and somehow the draughtsman got it wrong and it was not picked up.

A So this is what I am trying to distinguish between the proper understanding of defective construction drawing and defective design. My lady, I would like to add. Unfortunately in the engineering practice a lot of engineers when they see something wrong they say construction drawing is defective. They never think about defective design. This is unfortunate part about it.

B

[57] I understand from the foregoing, and concur, that the fact that the construction drawings in themselves contained 'errors' is not indicative of fault or negligence arising at that point. The reality is that the construction drawings were prepared on the basis of the tender drawings. To that extent therefore the C construction drawings were correct in that they embodied a correct copy or continuation of the tender drawings. The negligent error however arose in the tender drawings. Such error in the drawings in turn emanated from defective design calculations. These defective design calculations are therefore the source D of the negligence or error as envisaged under the policy.

[58] For these reasons I prefer the opinion of DW1, rather than PW2, who proferred the opinion that the construction drawings were 'erroneous' and this arose from a failure to review. I have highlighted the reasons for not accepting E his opinion earlier.

[59] In summary it appears to this court that:

(a) there were material lacunae in the factual matrix of the plaintiff's case F particularly in relation to the point of time and chronology of events between the production and creation of the 2006 designs, the tender drawings and the construction drawings. This is particularly significant in relation to the contention that there was a failure to review the original design in 2007 prior to the construction drawings resulting in a defective G building. There was no witness of direct fact or primary evidence to substantiate this contention. An adverse inference was drawn against the plaintiff for failing to produce either of the two engineers who are available, albeit no longer working with the plaintiff;

H (b) it is evident that there is a clear defect or negligence or error in the 2006 designs. This is borne out by the plaintiff's acceptance of the source of the error as arising in 2006 (the plaintiff simply maintains that there was a separate and independent error or source of negligence arising in 2007 as a consequence of the failure to review);

I (c) I have accepted DW1's expert evidence for the reasons set out above. I therefore accept that the design error emanated in 2006 and continued into 2007 as reflected in the construction drawings. To that extent there is no new 'error' in the construction drawings, which were created on the basis of the 2006 designs;

(d) it therefore follows that as there is no direct or primary evidence before this court of an independent act of negligence in 2007 such as a failure to review, and as the design defect or error or negligence arose as a result of the designs created in 2006, the relevant act of negligence or error arose in 2006, outside the retroactive period; and

(e) There is no factual premise to warrant the existence of any cause other than the 2006 act of negligence which is therefore the primary or dominant cause of the defective building and the plaintiff's loss.

[60] The position in law in relation to the 'dominant' or proximate cause has been comprehensively set out in *General Principles of Insurance Law* by ER Hardy Ivamy in his sixth edition, as follows:

> … Every event is the effect of some cause. It cannot, however, be treated as isolated; it is not an effect attributable solely to the operation of the cause working independently of everything else. It is necessarily preceded and led up to by a succession of events, but for which it would not, or might not, have happened. Hence it is nothing more than the last link in a chain of causes and effects which might be prolonged indefinitely into the past. The law however refuses to enter into a subtle analysis, or to carry back the investigation further than is necessary. It looks exclusively to the immediate and proximate cause, all causes preceding the proximate cause being rejected as too remote.

[61] In *Principles of Insurance Law* by Poh Chu Chai (5th Ed), the learned author stated that the proximate cause of a loss is not the cause which is the last in time to bring about the loss. It is the cause which leads in the natural sequence of events to the final loss. In *Yorkshire Dale Steamship Co Ltd v Minister of War Transport (The Coxwold)* [1942] AC 691, the House of Lords held as follows:

> The proximate cause of the loss of a ship is not necessarily the one which operates last, but is the effective and predominant cause, selected from among cooperating causes.

[62] And in *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 the House of Lords held as follows in relation to causation:

> To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but — if this metaphysical topic has to be referred to — it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain but a net. At each point, influences, forces, events precedent simultaneously, meet and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.

[63] In *American Home Assurance Co v Nalin Industries Sdn Bhd* [1993] 2 MLJ 409 the Supreme Court cited Lord Shaw of Dunfermline in *Leyland Shipping Co v Norwich Union Fire Insurance Society* (above):

> What does proximate' here mean? To treat proximate as if it was the cause which is proximate in time out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the even can be ascribed.
>
> In *Gray v Barr* at p 955, Lord Denning MR stated that it had been settled in insurance law that the 'cause' is that which is the effective or dominant cause of the occurrence, or as it is sometimes put, what is in substance the cause, even though it is more remote in point of time,, such cause to be determined by common sense.

[64] It is evident from an application of the foregoing that the dominant or proximate cause of the defective building in the instant case is the defective design created in 2006. It cannot be any other independent cause such as a failure to review the designs as encapsulated in the tender drawings prior to the creation of the construction drawings because there is firstly no factual matrix in the form of direct evidence that shows a failure to review in 2007. Secondly, even if such a factual premise had been established, the fact that DW1's expert evidence is preferred over that of PW2, means that this court accepts DW1's expert finding that the negligent error arose from the negligent designs in 2006 and that the 2007 construction drawings were a consequence of or sequential to, the negligent 2006 design. As such the finding of this court is that the dominant or proximate cause of the defective building is the defective design of 2006. This falls outside the purview of the policy which encompasses negligent errors causative of the loss in 2007. In other words, as the dominant or proximate cause is an error which occurred in 2006, the defendant's policy of insurance does not cover the loss.

Issue (b) In the event that this court finds that there are two equally dominant causes, whether the plaintiff has succeeded or is entitled to claim under the policy

[65] It is clear from the foregoing that I have concluded that there is only one proximate or dominant cause of the loss, namely the negligent design created in 2006. As such issue (b) does not arise.

LIMITING TERMS IN THE POLICY OF INSURANCE

[66] There are in any event certain salient clauses in the insurance policy that preclude or defeat the plaintiff's claim.

[67] Clause 2.4 provides:

> 2.4 Meaning of third party claims made and notice provisions
>
> For the purposes of this policy, a third party claim is considered to be made as soon as the insured and/or his agent or representative first:
>
> (a) Receives a written demand for damages of the type covered by this policy, including the service of suit or institution of legal or arbitration proceedings; or
>
> (b) Becomes aware of the intention of any person to make such a demand against them; or
>
> (c) Becomes aware of any fact, circumstance or event which could reasonably be anticipated to give rise to such a demand at any future time
>
> Whichever is the earliest.
>
> Any subsequent legal proceedings brought against the insured as a direct result of any matter or matters for which written notice has been given under b) or c) above, whether such proceedings are brought during or after the expiration of the policy period, is considered to be a third party claim first made against the insured at the time the insured first became aware of the said matter or matters. It is agreed however that the Insurer shall have no liability for any such matter or matters which do not result in legal proceedings being brought against the insured within two (2) years of the date of said written notice.

[68] As submitted by learned counsel for the defendant this clause envisages that there must be legal proceedings commenced against the plaintiff by a third party, namely CB land within two years of the date of the written notice before the defendant is liable under the policy. However no legal proceedings have been so commenced. There is no claim by a third party here because the remedial works were carried out by a contractor appointed by the plaintiff, rather than any third party. The clause envisages that the policy will cover claims made by third parties against the insured in respect of which legal proceedings ensue within two years of notification. As these requirements have not been met it does not appear that the plaintiff is entitled to claim under the policy.

[69] Clause 2.12 also envisages that the insured plaintiff cannot maintain an action against the insurer until the amount of loss has been fixed or rendered certain either by final judgment against the insured after the disposal of trial and appeals. No such loss has been fixed or rendered certain by way of a final judgment against the plaintiff here. The clause also envisages that no action shall be maintained unless brought within 12 months after the right of action accrued under the clause. This too has not been fulfilled.

[70] Clause 2.13 provides that the insured is under an obligation to remedy

at its own expense and within a reasonable time, any dangerous state which might lead to a loss or damage or the elimination of which has been demanded by the insurer. The rectification works undertaken by the plaintiff was arguably, to remedy the dangerous state of the defective building which could have led to loss or damage. This amounts to an express obligation which is to be undertaken at the plaintiff's own expense. Given this clause the plaintiff's entitlement to make this claim is unclear.

[71] Having considered the entirety of the foregoing matters I am satisfied that the plaintiff has failed to prove its case on a balance of probabilities. I therefore dismiss the plaintiff's claim with costs.

Plaintiff's claim dismissed with costs.

Reported by Kohila Nesan